

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE

NPS ENERGY SERVICES, INC., Appellant

v.

NELSON E. MOORE, Appellee

Direct Appeal from the Circuit Court of Sumner County
No. 19225-C, Hon. C.L. Rogers, Judge

No. M2002-02718-WC-R3-CV - Mailed - October 17, 2003
Filed - January 16, 2004

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel in accordance with Tenn. Code Ann. § 50-6-225(e)(3) for hearing and reporting findings of fact and conclusions of law. The employer/appellant contends: (1) that the trial court erred in determining that the employee suffered an injury arising out of and in the course of his employment, and (2) that the trial court erred in awarding forty percent (40%) permanent partial disability to the body as a whole. As discussed herein, the panel has concluded that the judgment of the trial court should be affirmed.

Tenn. Code Ann. § 50-6-225(e)(3) Appeal as of Right; Judgment of the Circuit Court Affirmed.

Frank G. Clement, Jr., Sp. J., delivered the opinion, in which Frank F. Drowota III, C.J., and Joe C. Loser, Jr., Sp. J., joined.

Raymond S. Leathers, Ruth, Howard, Tate & Sowell, Nashville, Tennessee, for the appellant NPS Energy Services, Inc.

George E. Copple, Jr., Nashville, Tennessee, for the appellee Nelson E. Moore.

Memorandum Opinion

Nelson E. Moore (Moore), appellee, is a journeyman painter who was employed by NPS Energy Services, Inc. (NPS), appellant, from September 1998 to December 1998. Moore was hired by NPS to abate lead from the Cumberland City Generating Plant of the Tennessee Valley Authority, a customer of NPS. On November 4, 1998, while working in the basement of the Cumberland City facility, Moore claims to have suffered a compensable injury as a result of exposure to airborne cleaning acids and caustic materials. NPS denies the assertion that Moore was exposed to or injured

by acids or caustic materials while employed by NPS.

NPS filed the complaint for declaratory judgment and Moore filed a counterclaim. The matter was tried on October 2, 2002. The trial court entered its final order the following day finding that Moore was exposed to chemicals while employed by NPS that caused occupationally induced asthma and awarded Moore forty percent (40%) permanent partial disability to the body as a whole. NPS filed this appeal.

Our review is de novo upon the record, accompanied by a presumption of correctness of the findings of fact, unless the preponderance of the evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2). We are not bound by the trial court's findings but, instead, conduct an independent examination of the record to determine where the preponderance of evidence lies. *Galloway v. Memphis Drum Serv.*, 822 S.W.2d 584, 586 (Tenn. 1991). Nevertheless, considerable deference must be accorded to the trial court's factual findings on issues related to the credibility of witnesses and weight to be given their testimony. *Krick v. City of Lawrenceburg*, 945 S.W.2d 709, 712 (Tenn. 1997). Conclusions of law, however, are subject to de novo review on appeal without any presumption of correctness. *Nutt v. Champion Intern. Corp.*, 980 S.W.2d 365, 367 (Tenn. 1998).

On November 4, 1998, Moore was working in the basement area of the Cumberland Furnace facility. This area is very large, approximately 500 feet wide, 300 feet deep and 20 feet high. The unit Moore was working on was shut down for 80 days for scheduled maintenance. Moore was wearing regular painting work clothes. Needing a "scissor lift" to perform his duties, Moore went to an area of the basement near what is referred to as the minor maintenance room. He found two scissor lifts, but both were missing an electrical box that was necessary to operate the lift. Moore searched in the maintenance room, and then, he went up to the next floor. Still unsuccessful in his search for an electrical box, Moore returned to the basement in an area near the minor maintenance room at which time Moore claims his nose started running, his eyes started burning and began to water, and his throat became sore. He also alleges that his face felt like it had needles in it. Seeing a sign that read "Warning, Acid", Moore went to a nearby bathroom and washed his eyes and face with water. Moore claims that he felt these sensations for 30 to 60 seconds. The pricks and tingling sensations stopped, and other sensations generally subsided as well.

Prior to January 1998, the Cumberland City facility had been using sulphuric acid and sodium hydroxide, identified as "caustic", to remove impurities from resin beds in the water purification system. In the area where Moore claims to have been injured, there were signs which read: "Danger: Caustic Lines", "Danger: Acid Line", "Danger: Acid Caustic Outlet", and "Danger: Acid and Caustic." Other signs indicated the lines were pressurized, but the evidence suggested that the lines had not been under pressure for months. At the time of the incident, the facility was no longer using acid or caustic for purification, however, the chemicals remained in tanks and pipes in the area at issue.

NPS insists that Moore did not suffer an injury arising out of his employment and during the course of his employment. Specifically, NPS contends there was no evidence of a chemical leak on November 4, 1998. Moreover, NPS contends that even if Moore were exposed, the chemicals were

not sufficiently hazardous to cause the respiratory problems claimed.

I. Did the trial court err in determining that the employee suffered an injury arising out of and in the course of his employment?

Moore did not seek immediate medical care. He stayed at work, had lunch on the site and worked that afternoon, though he had trouble breathing during the afternoon. Moore did not report the incident to his employer and he left work at 3:30 p.m. The day following the incident Moore went to his personal physician, Dr. J. D. Cox. Dr. Cox prescribed inhalants, antibiotics, and cough medicine. Later that evening Moore coughed up blood and returned to see Dr. Cox the next day. Following the second visit, Dr. Cox referred Moore to Dr. William Faith, a Board certified pulmonologist.

Dr. Faith performed the initial bronchoscopy and pulmonary function tests shortly after Moore's alleged injury, and remained his treating physician. Dr. Faith saw Moore on several occasions over a period of two years. Dr. James Snell, also a Board certified pulmonologist, was appointed by NPS to evaluate Moore. Dr. Snell examined Moore once, some three years after the alleged incident, and opined that Moore's asthma was caused by an infection, not chemicals, and was not work related.¹ Dr. Faith diagnosed Moore with occupationally induced asthma from chemical exposure and assigned a fifteen percent (15%) impairment rating. Dr. Faith based his opinion on Moore's symptoms and the requisite use of medication to treat the condition.

The evidence established that chemicals, including sulfuric acid (acid) and sodium hydroxide (caustic), were being stored on the premises when and where Moore was working and that the acid and caustic can be corrosive to the eyes, nose, throat, skin and mucus membranes. Moreover, the evidence established that Moore's symptoms arose immediately following the incident, that he coughed up blood the next evening and that he was treated by Dr. Cox the following day for these symptoms and shortly thereafter by Dr. Faith.

NPS argues that there is insufficient evidence as to causation and that Dr. Faith's opinion is little more than speculation. Although causation cannot be based upon speculative or conjectural proof, absolute medical certainty is not required, and reasonable doubt must be extended in favor of the employee. *Long v. Tri-Con Industries, Ltd.*, 996 S.W.2d 173, 177 (Tenn. 1999). Moreover, NPS argues that deference should be given to Dr. Snell's opinion that Moore's ailment was caused by an infection rather than exposure to chemicals. We find both physicians' testimony to be credible, yet our courts have held that the opinion of the treating physician should be entitled to greater weight than that of the physician who conducted an independent medical examination. *Carter v. First Source Furniture Group*, 92 S.W.3d 367, 373 (Tenn. 2002). Accordingly, we respectfully disagree with NPS. Since he was the treating physician, we find the opinion of Dr. Faith should be given more weight.

Admittedly, the evidence is controverted concerning whether Moore was exposed to harmful airborne chemicals while in the employment of NPS and whether he sustained a compensable injury. The trial court concluded that he was exposed to and received a compensable injury during the course and scope of his employment with NPS. Though there may be some doubt whether he did or did not receive a compensable injury, when there is reasonable doubt on causation, the doubt must be resolved in favor of the employee. *Long*, 996 S.W.2d at 177. We find that the evidence does not preponderate against the trial court's decision on this issue. Accordingly, we affirm the trial court on this issue.

II. Did the trial court err in awarding forty percent (40%) permanent partial disability to the body as a whole?

NPS further asserts that the trial court erred in its assessment of permanent partial disability

¹Dr. Snell stated that the chemicals might have caused a mild irritation.

of forty percent (40%) to the body as a whole, claiming it to be excessive for two reasons. The first argument is that Moore was able to work following the alleged injury. The second argument is that Moore had a pre-existing asthma condition and the condition was not aggravated by the alleged incident.

Moore has worked since the incident, though he switched jobs several times. Moore continued painting for a period of time following the incident, however, he claims he is no longer able to tolerate odors from the paint or the industrial environment. Therefore, Moore sought alternative employment due to his increased sensitivity to chemicals and odors. He worked a variety of non-industrial jobs where he received a significant decrease in wages. The evidence suggested that Moore had few transferable skills and that his work experience was primarily limited to industrial painting. At the time of trial, Moore was working for Wendy's receiving an annual income of \$27,000. When working for NPS, Moore's annual income was approximately \$41,000.

There is evidence to suggest that Moore may have had asthma since childhood, yet there is no evidence to suggest that the alleged pre-existing asthma condition ever restricted Moore in his work activities. Particularly, Moore testified that he had no symptoms and received no treatment for asthma since childhood until the incident at issue. Aggravation, acceleration, or exacerbation of a pre-existing condition or disease brought about by an accidental injury or occupational disease is compensable. *Thomas v. Aetna Life & Casualty Co.*, 812 S.W.2d 278, 284 (Tenn. 1991). Therefore, even if Moore had a pre-existing asthma condition, if it were aggravated by the chemicals, the injury at issue is compensable for there is no evidence that Moore previously experienced any limitations from the alleged pre-existing condition.

The assessment of vocational disability is to be based upon pertinent factors, including lay and expert testimony, employee's age, education, skills and training, local job opportunities, and capacity to work at the type of employment available in his disabled condition. *Corcoran v. Foster Auto GMC, Inc.*, 746 S.W.2d 452, 457 (Tenn. 1988). The existence and extent of a vocational disability are questions of fact for the trial court to determine, and are reviewed *de novo*, accompanied by a presumption of correctness, unless the preponderance of the evidence is otherwise. *Whirlpool Corp. v. Nakhoneinh*, 69 S.W.3d 164, 170 (Tenn. 2002). The record provides lay testimony of the severity of Moore's injuries, his limited education, and limited training and job skills. Furthermore, the record contains evidence which supports the treating physician's medical impairment rating. Because Moore has been significantly restricted in his employment capabilities, a forty percent (40%) permanent partial disability is not unreasonable.

Since Moore could not return to work for NPS, the maximum permanent partial disability award Moore could receive is six (6) times the medical impairment rating pursuant to American Medical Association Guidelines. Tenn. Code Ann. § 50-6-241(b). With a fifteen percent (15%) impairment rating, the maximum permanent partial disability the trial court could have awarded was ninety percent (90%). The trial court awarded forty percent (40%), which is less than half the maximum he could have received.

Therefore, we find that the evidence does not preponderate against the trial court's disability assessment and affirm the trial court on this issue.

Accordingly, we affirm the trial court on all issues. The costs on appeal are taxed to the appellant, NPS Energy Services, Inc.

Frank G. Clement, Jr., Special Judge

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No. 19225-C**

No. M2002-02718-SC-WCM-CV - January 16, 2004

JUDGMENT

This case is before the Court upon the motion for review filed by NPS Energy Services, Inc. pursuant to Tenn. Code Ann. § 50-6-225(e)(5)(B), the entire record, including the order of referral to the Special Workers' Compensation Appeals Panel, and the Panel's Memorandum Opinion setting forth its findings of fact and conclusions of law.

It appears to the Court that the motion for review is not well-taken and is therefore denied. The Panel's findings of fact and conclusions of law, which are incorporated by reference, are adopted and affirmed. The decision of the Panel is made the judgment of the Court.

Costs are assessed to NPS Energy Services, Inc., for which execution may issue if necessary.

DROWOTA, C.J., NOT PARTICIPATING